



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 1, 2003

Mr. Steve Aragón
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2003-5330

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185230.

The Texas Health and Human Services Commission (the "commission") received a request for information regarding the fraud case against the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Because your claim regarding section 552.108 is the broadest, we address it first. This section excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). An agency whose function is essentially regulatory in nature is not a "law enforcement agency" for purposes of section 552.108. *See* Open Records Decision No. 199 (1978) (predecessor statute). However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

MW-575 (1982), Open Records Decision No. 493 (1988); *see also* Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked by any proper custodian of information which relates to incident). A governmental body that raises an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply the explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that the requested information pertains to an on-going case by the Medicaid Program Integrity ("MPI") unit of the commission's Office of Investigations and Enforcement ("OIE") regarding possible violations of Medicaid regulations. You also state that the commission is required to cooperate with the Medicaid Fraud Control Unit ("MFCU") of the Office of the Attorney General and other law enforcement agencies in appropriate cases. You state that this case has been referred to MFCU and the United States Attorney for further investigation and possible prosecution. Based on these representations, we conclude that information represented by Exhibits A through M, O, and P may be withheld pursuant to section 552.108(a)(1). *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We now address your remaining arguments for Exhibit N. You assert that portions of this exhibit are excepted under section 552.107(1), which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not

intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Having considered your arguments and the information submitted as Exhibit N, we agree that some of this information constitutes privileged attorney-client communications that may be withheld under section 552.107(1). However, the documents you seek to withhold also include handwritten notes. These notes do not reflect privileged communications. In addition, the notes themselves do not indicate, and you have not otherwise explained, whether they were communicated among privileged parties. We therefore conclude that such handwritten notes may not be withheld on the basis of section 552.107.

You also assert that the handwritten notes constitute attorney work product. A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996).

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney’s mental processes, conclusions, and legal theories.

The first requirement that must be met to consider information “attorney work product” is that the information must have been created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

See National Tank, 851 S.W.2d at 207. A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204.

The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* Having considered your representations and reviewed the information at issue, we agree that the handwritten notes constitute attorney work product and may therefore be withheld pursuant to section 552.111.

In summary, information such as Exhibits A through M, O, and P may be withheld pursuant to section 552.108(a)(1). You may withhold attorney-client communications like those in Exhibit N pursuant to section 552.107. Attorney notes may be withheld under section 552.111. As our ruling on these issues is dispositive, we need not address your remaining arguments.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

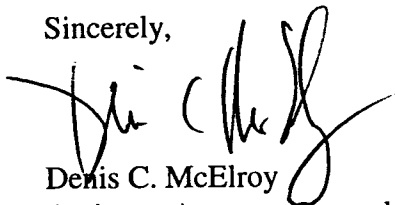
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 185230

Enc. Submitted documents

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(w/o enclosures)